UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PEOPLE UNITED FOR SUSTAINABLE HOUSING, INC.

and

CASES 03-CA-271790,
03-CA-271788

JOANNE "AMINAH" JOHNSON, An Individual,

and

KATHERYN CEJKA, An Individual

POST-HEARING BRIEF
ON BEHALF OF
RESPONDENT PEOPLE UNITED FOR SUSTAINABLE HOUSING, INC.

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PRELIMINARY STATEMENT

At the heart of this case is whether an email sent by the Charging Parties ("the Email") requesting to take on a role in duties belonging to a company's Executive Director and board of directors – that is, presentation and adoption of the company's annual budget – is protected activity. This effort to take part in making top-level financial business decisions which are at the core of entrepreneurial control is not protected activity.

Employees do not have a right under the National Labor Relations Act ("the Act") to be equal partners in the running of the business, or to a role in making business decisions. Rather, Section 7 protects employees' collective efforts to improve their lot as employees with respect to their wages, benefits, and other working conditions.

The Email did not raise any complaints, concerns, or even questions about employee wages, benefits, working conditions, or any terms of employment. It was completely silent on these topics. The Email neither objectively nor subjectively had anything to do with terms and conditions of employees' employment and the Charging Parties admit that the Email was not intended to raise any complaint or concern. Nor did management interpret the Email as a communication which related to those topics. Likewise, this is not a case where the Charging Parties attempted to protest an employer decision or policy that impacted their terms or conditions of employment. Rather, the Email was an attempt at involving themselves in *making* key business decisions determinative of the organization's overall strategic direction, and which impact nearly every facet of the organization. That is, funding of the operations of the enterprise – a function exclusively vested with the Executive Director and the board of directors, which is clearly beyond the protections of Section 7 of the Act.

The General Counsel argues that an organization's budget has to do with "money" which, in turn, has a bearing on employee wages or benefits. Such specious argument is divorced from the realities of this case, as well as applicable law, and is an after-the-fact attempt to draw a connection between the Email and employee working conditions where no such connection exists. Here, the Charging Parties were admittedly not concerned with their wages or working conditions in sending their Email. Even so, and even if the General Counsel's argument that the employer's "money" has an ultimate impact on the Charging Parties' terms and conditions of employment is accepted, the applicable law recognizes that, while all sorts of management decisions could

eventually have some conceivable effect on rank-and-file employees, in order invoke Section 7 rights, the impact must be "direct, not speculative, eventual, or trickle down."

The Email makes no reference to wages, benefits, layoffs, discipline, or any other terms or conditions of employment. There is no underlying background context in this case which ties the Email to some underlying labor dispute, impending layoff, or some other employment-related issue, where the Email could fairly be understood as dealing with terms and conditions of employment, even in the absence of any express reference to terms and conditions of employment. Simply put, the Email is not protected activity and the instant Complaint should be dismissed on that ground.

Even if the Email were protected activity (which it is not), the Charging Parties' employment ended due to their own poor job performance, not because of the Email. The Charging Parties' inevitable separations from employment are squarely documented in text messages and email communications amongst members of management that pre-date the Email. The Complaint should be dismissed on this ground as well.

FACTS

The Respondent People United For Sustainable Housing, Inc. ("PUSH") is a 501(c)(3) not-for-profit membership corporation whose mission is to mobilize marginalized populations in poverty-stricken areas to create neighborhoods with quality, affordable housing; to expand local hiring opportunities; and to advance economic and environmental justice in the City of Buffalo. [Hearing Trans. p. 162 lns. 3-18]. The Charging Parties, Kat Cejka and Joanne ("Aminah") Johnson are former employees of PUSH.

PUSH is organized into six departments: a Property Management Department, a Property Maintenance Department, the Community Planning and Development Department, New Economy Department, Organizing Department, and Finance Department. [Hearing Trans. p. 164-167]. Day-to-day operations are managed by an executive management team made up of Executive Director, Rahwa Ghirmatzion; Deputy Director of Administration, Dawn Wells-Clyburn; and the Deputy Director of Movement Building, Harper Bishop. [Hearing Trans. p. 16 lns. 12-19; p. 253 lns. 17-18; p. 281, lns. 2-7].

PUSH has a volunteer board of directors whose main role is to ensure that PUSH is fulfilling its mission, as well as providing high-level financial oversight. [Hearing Trans. p. 168

lns. 2-9]. As is typical of a not-for-profit board, PUSH board members have no involvement in day-to-day operations or employee matters. [Hearing Trans. p. 168-169]. Board members do not develop employee wages scales, do not get involved in employee disciplinary decisions, do not decide employee benefits, do not develop job descriptions, do not give employee performance evaluations, nor make hiring decisions with respect to any employees other than the Executive Director. [Hearing Trans. p. 168-169].

PUSH, like any organization, develops an annual budget. [Hearing Trans. p. 223 lns. 12-14]. The annual budget outlines anticipated expenses and revenues. [Hearing Trans. p. 223 lns. 15-21]. PUSH begins developing its budget each Summer. [Hearing Trans. p. 226 lns. 5-9]. Management continues development of the budget for months, creating multiple iterations and revisions to the budget. [Hearing Trans. p. 224-225]. Toward year-end, typically in December, the Executive Director presents the final budget to the board of directors. [Hearing Trans. p. 224 ln. 6; p. 226 lns. 16-25]. The board of directors then approves the budget in January. [Hearing Trans. p. 226-227]. The master budget is highly complex, and takes into account all organization expenses and revenues, including numerous sources of government and grant funding which come with many terms and conditions for use of funds. [Hearing Trans. p. 223 lns. 15-25; p. 224-226]. The Organizing Department represents approximately 1% to 2% of the overall organizational budget. [Hearing Trans. p. 228 lns. 20-25]. It is the PUSH Executive Director's job to present the final budget to the board of directors, and the board of director's job to approve the budget. [Hearing Trans. p. 224 ln. 6; p. 227 lns. 3-9; p. 228 ln. 2-19]. Rank-and-file employees have no role (and have never been given a role) in the presentation of the budget to the board of directors or in the approval of the organization's final budget. [Hearing Trans. p. 85 lns. 3-11; p. 143 lns. 21-25; p. 229 lns. 1-3; p. 231 lns. 11-12].

From time-to-time, rank-and-file staff members expressed an interest in learning more about PUSH's budget (that is, sources of funding and where PUSH's resources are put to use). [Hearing Trans. p. 229 lns. 4-25]. In response, and in line with PUSH's value of corporate transparency, PUSH decided to implement a "participatory" budget initiative, through which it would familiarize staff with the not-for-profit budgeting process, and give them an opportunity to offer input on programmatic expenses. [Hearing Trans. p. 229-230]. As it relates to the instant matter, in the Spring of 2020, PUSH asked staff in the Organizing Department to prepare proposed budgetary expenditures, specifically related to programmatic expenses only (for example,

estimated expenses that might be incurred for travel, lodging, and events or meetings, including things like the cost of food, refreshments, or printing related to such activities). [Hearing Trans. p. 85 lns. 12-23; p. 231 lns. 7-25; p. 232 lns. 1-7; p. 254 lns. 20-25; p. 255, lns. 11-18]. They were specifically told they were not being asked to address personnel costs or revenue sources.[1] [Hearing Trans. p. 85 lns. 12-23; p. 232 lns. 3-7]. In connection with this effort, Ms. Wells-Clyburn took the time to explain to Organizing Department employees the organization's annual budget process and timeline. [Hearing Trans. p. 232 lns. 8-12; p. 238 lns. 1-9]. Ms. Wells-Clyburn and Mr. Bishop also met with Organizing Department employees, including both Charging Parties, several times during the Spring and Summer of 2020 to give feedback on their individual budget ideas. [Hearing Trans. p. 271 lns. 5-11]. At no point during any of these meetings (or at any other time) did either of the Charging Parties (or any other employees) raise concerns or questions about their wages, benefits, or working conditions in relation to the budget (or otherwise). [Hearing Trans p. 245; p. 268-269; p. 287]. The Charging Parties do not allege that any member of management indicated that there were anticipated funding cuts (or expenditures) that would in any way impact the Charging Parties' jobs or the jobs of other employees. [*See* Hearing Trans. p. 307-308 (Cejka admitting that resources used in her job, such as VPN access, would be paid for and were not being taken away)].

At no point during the Spring/Summer of 2020 (or at any other time) did the Charging Parties (or any other employee) raise any concerns, complaints, or even so much as a question concerning their own or other employees' wages, benefits, or other terms or conditions of employment in connection with the budget process (or otherwise).[2] [Hearing Trans p. 95 lns. 4-25; p. 243 lns. 5-15; p. 245; p. 268-269; p. 287].

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[1] Even though the Organizing Department employees were given this instruction, Charging Party Cejka nonetheless included a line item for her own wages on her budget proposals. However, she listed her wages at the rate she was currently being paid; she was not proposing an increase in her wages. [Respondent Exhibit 21; GC Exhibit 2(g) (Cejka budget proposals); Hearing Trans. p. 86 lns. 10-24]. Charging Party Johnson did not include any information about her wage or any other employees' wage on her budget proposals, specifically noting that "This budget will not include salary specifics." [Respondent Exhibit 7; GC Exhibit 2(f) (Johnson budget proposals)].

[2] One "issue" wholly unrelated to employee wages and working conditions that Ms. Johnson did express upset about several times to PUSH management during the Spring/Summer of 2020 was her suggestion that PUSH spend $1,080 to contract with a man she knew named Nate Boyd (who was not an employee of PUSH) to videotape slumlord properties. [Respondent Exhibit 7 (Johnson budget proposals); Hearing Trans. p. 132-133]. Mr. Bishop explained to Ms. Johnson that PUSH would not contract with an outside party to do videography, since PUSH already had in-house staff who perform that work. [Hearing Trans. p. 242]. Ms. Johnson also asked Mr. Bishop if she could present PUSH's budget to the board of directors. Mr. Bishop responded, no, as that is the Executive Director's job. [Hearing Trans. p. 242].

A. THE EMAIL

On August 6, 2020, after PUSH management finished accepting input on programmatic budget expenses from Organizing Department employees, Ms. Cejka sent an email (the "Email") to the entire PUSH board of directors and the executive management team stating:

> "We the undersigned request a viewing and copy of the final, edited budget report prior to its presentation to the board as well as to be present in the board meeting when it is met upon. We request there be time reserved at Friday's Organizing Admin meeting to discuss this topic further."

[Respondent Exhibit 1, Bates p. R3-R4]. The Email was signed "the Organizing Team," and listed the names of other Organizing Department employees, including: Ms. Johnson, Angel Rosado, Kelly Camacho, Tyrell Ford, and Da'Von McCune. [Respondent Exhibit 1, Bates p. R3-R4].

Upon receiving this Email, both the executive management team and board members were confused by it, particularly since it was only August, no final budget had yet been created, and the Board meeting at which such budget would be voted on was many months away. [Hearing Trans. p. 237 lns. 1-19; p. 258-259; p. 282-283]. The Organizing Department staff was expected to have known this, as Ms. Wells-Clyburn explained this timeline to them, yet the Email reflected that the Organizing Department employees had not paid attention to the information PUSH management had taken the time to explain to them. [Hearing Trans. p. 259]. As the Email reflected a clear misunderstanding of the budget process, Ms. Ghirmatzion replied to the Email, explaining PUSH's budget process and timeline, including the fact that no final draft budget had yet been created, that the final budget draft would not be presented to the board of directors until December 2020. [Respondent Exhibit 1, Bates p. R1].

On the evening of August 6, 2020, Ms. Ghirmatzion spoke with Ms. Johnson on the telephone and asked her why she did not come to Ms. Ghirmatzion with the questions she had relative to the budget, rather than emailing the entire board of directors in the first instance. [Hearing Trans. p. 241-242]. Ms. Johnson responded that she knew Ms. Ghirmatzion was busy and she did not want to bother her. [Hearing Trans. p. 242 lns. 1-6]. During this conversation, Ms. Johnson told Ms. Ghirmatzion about her suggestion to retain an external videographer, Nate Boyd, and that Mr. Bishop had rejected it. Ms. Ghirmatzion explained that Mr. Bishop was correct, as PUSH had in-house staff to do the task. [Hearing Trans. p. 242 lns. 15-25]. During this conversation, Ms. Johnson also told Ms. Ghirmatzion that she had asked Mr. Bishop if she could present PUSH's annual budget to the Board, and he said no. [Hearing Trans. p. 242 lns. 8-14]. Ms.

Ghirmatzion explained to Ms. Johnson that presenting the annual budget is her job, as the Executive Director, and Mr. Bishop had correctly let her know that. [Hearing Trans. p. 242 lns. 8-24].

Ms. Ghirmatzion also spoke with the Organizing Department the following day on August 7, 2020 during their pre-scheduled weekly administrative meeting.[3] During this meeting, she stated that she was confused as to what their Email was about. [GC Exhibit 3(b) (Transcript of August 7, 2020 meeting) p. 5 lns. 1-5 (Ms. Ghirmatzion: "[I]t was quite confusing, considering that I talked to some of you. And some of you said, we did this in solidarity. The solidarity to what? If any of ya'll have an answer, that's fine. If not, that's okay, I'll move on.")]. Ms. Ghirmatzion also explained to Organizing Department employees that the annual budget is the responsibility of the Executive Director, finance committee, and board of directors. [GC Exhibit 3(b) (Transcript of August 7, 2020 meeting) p. 2 lns. 1-5].

During this August 7, 2020 meeting, after Ms. Ghirmatzion expressed PUSH management's confusion as to what the Email was about, both Charging Parties expressly stated that the Email was not making a complaint of any kind. Ms. Cejka stated:

> "I mean,..[Charging Party Johnson] had asked in a meeting, our last admin meeting, to present and-- we were told no. And we weren't complaining or trying to whistleblow or anything like that; we were just asking to be heard and included."

[GC Exhibit 3(b) (Transcript of August 7, 2020 meeting) p. 6, lns. 22-25, p. 7., ln. 1,]. Charging Party Johnson likewise confirmed the same during the August 7, 2020 meeting, following up Charging Party Cejka's comment above, with the following statement:

> "That's right. We weren't trying to whistleblow…. We basically, because Harper said no to our request for the board-- I mean, for us to be present with the board when they do review the budget. And we figure, well, as long as it's right at the same time that we presented the budget, we shouldn't wait to -- to request also to be part of the presentation to the board. When – we know that it's going to be like, overlooked and the process with all that. But in the end, that's what we asked. And we weren't, again, like I said, whistleblowing or anything. We weren't saying nobody was doing anything wrong. We weren't saying nobody was doing anything right…. We-- wanted everybody to, I guess, to decide, the board and Rahwa and Harper. It -- to -- to decide together."

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[3] This August 7, 2020 meeting occurred via Zoom and, without the knowledge of Ms. Ghirmatzion or any other member of PUSH management, Ms. Cejka recorded this meeting. [*See* GC Exhibit 3(a) (video recording of August 7, 2020 meeting in Sharepoint); GC Exhibit 3(b) (Transcript of August 7, 2020 meeting); Hearing Trans. p. 95 lns 4-8; p. 243 lns. 21-23].

[GC Exhibit 3(b) (Transcript of August 7, 2020 meeting) p. 7 lns. 2-23].

At no point during the August 7, 2020 meeting did either of the Charging Parties (or any other Organizing Department employee) raise any concerns regarding their wages, benefits, or working conditions or state that the Email related to such. [*See* GC Exhibit 3(b) (Transcript of August 7, 2020 meeting)]. In fact, neither of the Charging Parties (nor any other Organizing Department employee) ever raised any concerns, complaints, or even questions with respect to their wages, benefits, or working conditions at any time either before or after the Email. [Hearing Trans. p. 245]. Nor does the Email itself, on its face, have anything to do with employee wages, benefits or other terms or conditions of employment. [Respondent Exhibit 1, Bates p. R3-R4]. Moreover, management did not interpret the Email as having anything to do with employee wages or other terms of employment. [Hearing Trans. p. 258 lns. 22-24].

B. CHARGING PARTIES' SEPARATIONS

Separate and apart from the Email, both Ms. Cejka and Ms. Johnson were terminated for their poor job performance; the Email was not the reason for their separations. [Hearing Trans. p. 170-173, p.184-192; Respondent Exhibit 16 (Johnson termination letter, stating "there have been concerns with you fulfilling the requirements of your job description"); Hearing Trans. p. 210-223; Respondent Exhibit 20 (Cejka PIP)]. Documentary evidence shows that the decision to terminate both Charging Parties' employment was made by PUSH management well before the Email, and discussions about terminating Ms. Cekja's and Ms. Johnson's employment were frequent and ongoing. [Hearing Trans. p. 259-260; Hearing Trans. p. 284 lns. 6-13; Hearing Trans. p. 286 lns. 20-25; Respondent Exhibit 12 (July 21, 2020 email proposing to transfer Johnson to Ambassador role); Respondent Exhibit 18 (August 4, 2020 text messages amongst executive management discussing termination of Johnson); Respondent Exhibit 24 (text messages amongst executive management discussing termination of Cejka); Respondent Exhibit 20 (Cejka PIP)].

With respect to Ms. Johnson, her job was to work with tenants to resolve issues with landlords, as well as perform various administrative tasks. [Respondent Exhibit 6 (Tenant Advocate job description)]. Upon Ms. Johnson's return from a leave of absence in 2019, her job performance steeply declined. [*See* Respondent Exhibit 8 (February 4, 2020 email from Johnson to Ghirmatzion apologizing for inappropriate behavior); Hearing Trans. p. 183-191]. In early 2020, Ms. Johnson yelled so loudly at her supervisor Mr. Bishop that Ms. Ghirmatzion overheard

the her yelling from her closed-door office while on a telephone call. [Hearing Trans. p. 183-184]. Ms. Ghirmatzion ended her call to investigate the source of the yelling, which turned out to be Ms. Johnson yelling at Mr. Bishop about her job description. [Hearing Trans. p. 183-184; Hearing Trans. p. 123-124]. Ms. Johnson would also frequently burst into Ms. Ghirmatzion's office unannounced to discuss extraneous matters, even after Ms. Ghirmatzion resorted to posting a sign on her door instructing that she was on the telephone and to not enter. [Hearing Trans. p. 172 lns. 1-15]. Ms. Johnson's work performance problems reached a breaking point in the midst of the COVID-19 pandemic, which necessitated a virtual work environment in the Spring and Summer of 2020. Ms. Johnson lacked even elementary adeptness with the most basic technology, which further compounded her inability to perform the tasks assigned to her. [Hearing Trans. p. 186-187]. During the Spring and Summer of 2020, PUSH made multiple offers to Ms. Johnson for individualized technology training, all of which she declined. [Hearing Trans. p. 186-189]. Ms. Johnson was also offered a computer to take home to enable her to perform her work remotely; she declined that as well. [Hearing Trans. p. 127 lns. 2-23; p. 187 ln. 1-13]. Moreover, during the Spring and Summer of 2020, Ms. Johnson would report forty (40) hours of working time on her time records, even though she was only authorized to work thirty-two (32) hours, and, worse yet, she could produce only several hours' worth of work product. [Hearing Trans. p. 187-188]. During the same time, the community need for PUSH's services rose exponentially with the COVID-19 pandemic and it was critically important to have an employee functioning effectively in the Tenant Advocate role. [Hearing Trans. p. 191]. Throughout the Spring and Summer 2020, and even earlier, the executive management team discussed the need to remove Ms. Johnson from the Tenant Advocate role so that a more effective individual could successfully perform that job. [*See* Respondent Exhibit 12 (July 21, 2020 email proposing to transfer Johnson to Ambassador role); Respondent Exhibit 18 (August 4, 2020 text messages amongst executive management discussing termination of Johnson); Hearing Trans. p. 284 lns. 6-13]. Many concessions were made for Ms. Johnson which would not have been extended to others, but for the length of Ms. Johnson's tenure with PUSH, the fact that she was well-connected within the communities that PUSH serves and social movements in which PUSH operates, and the fact that she indicated a desire to retire in the imminent future in any event. [Hearing Trans. p. 129 lns. 5-10; p. 189-190].

As early as the beginning of 2020, PUSH began formulating plan for Ms. Johnson's separation, including moving her to an "ambassador role" with the organization, for which she

would be paid a stipend. [*See* Respondent Exhibit 12 (July 21, 2020 email proposing to transfer Johnson to Ambassador role); Respondent Exhibit 16 (Johnson termination letter)]. An email from Ms. Wells-Clyburn to Ms. Ghirmatzion dated July 21, 2020 and Mr. Bishop outlines the "ambassador program" and designates Ms. Johnson for the role. [Respondent Exhibit 12]. On August 4, 2020, Ms. Ghirmatzion, Ms. Wells-Clyburn, and Mr. Bishop had a group text message conversation in which they expressly discussed the plan for Ms. Johnson's termination from employment. [*See* Respondent Ex. 18 (Mr. Bishop stating: "Aminah still suckered me into lunch during Covid. Can we please set a timeline for releasing her into the world?")].

In late August 2020, after Ms. Johnson's failure to perform the Tenant Advocate job reached a critical breaking point with the pandemic-mandated virtual work environment, PUSH decided to remove her from the Tenant Advocate role. [Hearing Trans. p. 190-192]. PUSH offered Ms. Johnson a severance package and new ambassador role to begin October 2020. [*See* Respondent Exhibit 6 (Johnson termination letter); Hearing Trans. p. 136 lns. 16-24]. Ms. Johnson declined the offer and, accordingly, stopped working for PUSH. [Hearing Trans. p. 136 lns. 16-24].

With respect to Ms. Cejka, she was hired in October 2019 for the entry-level hourly role of Community Data and Logistics Coordinator, which was essentially a data entry position. [Respondent Exhibit 19 (Cejka job description); Hearing Trans. p. 202-204]. Ms. Cejka's job was to enter tenant and landlord-related data into a software system called "Salesforce." [Hearing Trans. p. 202-204]. She worked for PUSH for less than a year, as her performance was unacceptable from the start and efforts to assist her in improving were futile. [Hearing Trans. p. 206-221; Respondent Exhibit 20 (Cejka PIP)]. After her 90-day introductory period, Ms. Cejka was placed on a Performance Improvement Plan, which describes pages of performance deficiencies. [Respondent Exhibit 20 (Cejka PIP)]. Although her performance marginally improved, in short order after completing the Performance Improvement Plan, Ms. Cejka began backsliding in terms of her performance. Ms. Cejka's ideas about what her job should encompass did not align with what PUSH actually hired her to do. [Hearing Trans. p. 213-215]. Ms. Cejka would frequently demand to speak directly to the Executive Director about her differing philosophies on the organization's mission and initiatives, as well as her theories on data security with respect to tenant and member information. [Hearing Trans. p. 214 lns. 21-25; p. 215]. Her job performance was poor throughout her less than 10 months with PUSH. In early August 2020,

PUSH decided to cut off Ms. Cejka's access to PUSH's data repository and systems while it reviewed her continued employment, days after she engaged in an inappropriate confrontation with PUSH's Executive Director Ms. Ghirmatzion in which she called Ms. Ghirmatzion a liar. [Hearing Trans. p. 220-221; p. 246 lns. 2-9]. Specifically, Ms. Cejka confronted Ms. Ghirmatzion about PUSH's strategic decision to end a temporary rental assistance program that it had started in response to the COVID pandemic. [Hearing Trans. p. 220-221]. Ms. Cejka angrily voiced her disagreement with the ending of this program and accused Ms. Ghirmatzion of lying to PUSH's members and the community in connection with the closure. Ms. Ghirmatzion explained that the rental assistance program was intended to be temporary in nature and PUSH was intending to devote resources to longer-term initiatives which would promote permanent sustainability (versus rental assistance, which was considered a "short-term" emergency measure in response to the onset of the pandemic). [Hearing Trans. p. 220-221]. Not only was Ms. Cejka's confrontation inappropriate, it had nothing to do with her data entry job. [Hearing Trans. p. 220-221]. This was yet another instance of Ms. Cejka overstepping and wasting management time on matters wholly unrelated to the data entry job she was hired to do. Following these behaviors by Ms. Cejka, Ms. Ghirmatzion decided to restrict Ms. Cejka's access to PUSH's Salesforce program while management reviewed her continued employment. [Hearing Trans. p. 246-247]. On August 12, 2020, when Ms. Cejka noticed that her access was limited, she asked Mr. Bishop if that meant she was going to be terminated, and Mr. Bishop replied in the affirmative. [Hearing Trans. p. 68 lns. 15-23, p. 69 lns. 1-3]. Just minutes after her discussion with Mr. Bishop ended, Ms. Cejka sent an email to PUSH management resigning from her employment. [GC Exhibit 2(e) (Cejka resignation email)].

Like Ms. Johnson, documentary evidence establishes that PUSH was discussing Ms. Cejka's immanent termination well before she sent the Email. On July 9, 2020, Mr. Bishop text messaged Ms. Wells-Clyburn stating, "Hey hey ho ho Kat has gotta go!," referring to the need to terminate Ms. Cejka. [Respondent Exhibit 24; Hearing Trans. p. 284-286]. In short, management discussions about Ms. Cejka's poor job performance and inevitable termination from employment were ongoing during her entire ten-month tenure with PUSH. [Hearing Trans. p. 222 ln. 7-12; p. 260 lns. 9-12; 286 lns. 24-25]. Indeed, Ms. Cejka herself testified that her first supervisor, Emily Terrana told her at the end of January 2020 that Ms. Ghirmatzion wanted to terminate her

employment, and that management was having discussions about her termination. [Hearing Trans. p. 93 lns. 1-19].

None of the other employees whose names appeared on the signature line of the Email (i.e., Angel Rosado, Kelly Camacho, Tyrell Ford, Da'Von McCune) were terminated or disciplined following the Email. [Hearing Trans. p. 244].

ANALYSIS

A. THE EMAIL IS NOT PROTECTED UNDER SECTION 7 OF THE ACT

The central issue in this case is whether Charging Party Cejka's August 6, 2020 Email to the PUSH Board of Directors and executive managers constituted protected concerted activity under the Act. It did not.

Section 7 of the Act provides that, "Employees shall have the right of self-organization, to form join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..." Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. 29 U.S.C. § 158(a)(1).

1. The Email Does Not Reference Or Relate To The Charging Parties' Terms Or Conditions Of Employment And Was Not Aimed To Improve The Charging Parties' Lot As Employees.

There are limits on the scope of activities Section 7 covers. Section 7 protected activity has been described as "legitimate activity that could improve [employees'] lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *see also Harrah's Lake Tahoe Resort Casino*, 325 N.L.R.B. 1244 (1992) (ALJ Decision, aff'd) ("Section 7 protections are not boundless… [T]he Supreme Court defined the scope of the 'mutual aid and protection' clause in Section 7… as limited to those matters involving "employees' interests as employees."). The Supreme Court in *First National Maintenance* held that there are certain topics that are outside the ambit of the Act and, specifically, outside the Act's concept of "terms and conditions of employment." In the context of defining what is a mandatory subject of bargaining, the *First National Maintenance* Court observed, "[d]espite the deliberate openendedness of the statutory language, there is an undeniable

limit to the subjects about which bargaining must take place," and furthermore, "the limitation includes only issues that settle an aspect of the relationship between the employer and the employees." *First Natl. Maintenance Corp. v. NLRB*, 452 US 666 (1981). Outside the reach of the Act are topics that have only an "indirect and attenuated impact on the employment relationship," such as, for example: financing arrangements, choice of advertising and promotion, and product type and design. *Id*. Contrast this with topics that the Act is intended to cover, such as wages and employee benefits, as well as: order of layoffs and recalls; production quotas; and work rules. *See Id.* Indeed, in *First National Maintenance*, the Supreme Court held that even a management decision with a direct impact on employees' employment which resulted in employee terminations was not part of the Act's definition of "terms and conditions" of employment when such management decision had its primary focus on the employer's profitability.

Here, the Email at issue has nothing to do with employee terms and conditions of employment on its face or otherwise. [*See* Respondent Exhibit 1, Bates p. R3-R4]. The Email makes no reference to wages, employee benefits, work rules, employee discipline, work schedules, workplace safety, employment policies, working conditions, or any other terms or conditions of employment. Nor does it remotely concern any of these topics. Rather, the Email merely asks questions about a core managerial function – development of the company-wide annual budget.

The Board has held that written communications, like the Email here, which contain no "reference to wages or working conditions" of employees are not protected. For example, in *Five Star Transp., Inc.*, 349 N.L.R.B. 42 (2007), the Board affirmed Administrative Law Judge Amchan's holding that two school bus drivers were not engaged in protected activity when they wrote letters which failed to raise employment concerns, finding that "other than some very generalized assertions about the quality of [the] Respondent's busses, neither made any other reference to the wages and working conditions of the school bus drivers." In upholding Judge Amchan's finding, the Board explained:

> We agree with the judge, and find that [the drivers] Ocasio and Kupras did not engage in protected activity under the Act. Section 7 of the Act provides employees with the right to engage in concerted activities for the purpose of collective bargaining or "other mutual aid or protection." It is well established that Section 7 protects employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). **Nevertheless, "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and that "at some**

> **point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."** Id. at 567-568.
>
> In the case of drivers Ocasio and Kupras, we find that **the content of their letters was not sufficiently related to the drivers' terms and conditions of employment to constitute protected conduct**. In their letters, Ocasio and Kupras focused solely on general safety concerns and did not indicate that their concerns were related to the safety of the drivers as opposed to others.

Id. (footnote omitted; emphasis added). The Board further found that the letters were unprotected, even though they were written as part of other drivers' letter-writing campaigns where the other letters did raise employment-related concerns and were protected concerted activity:

> Further, we are not persuaded that these two letters should be interpreted as raising the drivers' common concerns simply because they were written as part of the drivers' letter-writing campaign. Instead, we determine whether certain communications are protected by examining the communications themselves. Accordingly, because the concerns expressed in the letters of Ocasio and Kupras were limited to a discussion of generalized safety concerns, as opposed to the drivers' common concerns involving their terms and conditions of employment, we find that the judge properly found that the conduct of Ocasio and Kupras was not protected by Section 7 of the Act.

Id. The Board also noted that, in contrast to other cases where protected communications referenced employment matters (such as a layoff, for example), the letter at issue in *Five Star* had "no comparable reference to a term or condition of employment." *Id*.

Like the unprotected letters in *Five Star*, the Email here makes no reference to any term or condition of employment. Moreover, there is no broader labor-related context or set of circumstances in which this Email was sent – such as a labor dispute, impending layoff, or proposed wage cuts – which could conceivably tie the Email to any employment-related matter. In that regard, the Email objectively (that is, on its face) has nothing to do with the Charging Parties' working conditions and, similarly, subjectively has nothing to do with the Charging Parties' working conditions. The Email simply has nothing to do with the wages, working conditions, or other terms of employment of the Charging Parties or other employees.

2. PUSH's Annual Budget Had No Direct Impact On The Charging Parties' (Or Any Other Employees') Terms And Conditions Of Employment

To the extent that the General Counsel argues that PUSH's annual budget could have ultimately had an eventual impact on the Charging Parties' terms and conditions of employment

when it was eventually adopted months after the Email was sent, the law is clear that, in order for a management decision to implicate Section 7, the "impact must 'direct,' not speculative, eventual, or trickle down." *Riverbay Corporation, d/b/a Co-Op City*, 341 NLRB 255 (2004). The Board has made clear:

> **Obviously, all kinds of management decisions made by a company's board of directors could eventually have some conceivable effect on rank-and-file employees. Under the case law, however, the impact must be "direct," not speculative, eventual, or trickle down.**

Id. (emphasis added).

Here, any eventual impact of the organization-wide annual budget on the Charging Parties' employment would have been indirect and speculative. The annual budget was not to be adopted until nearly five (5) months after the Email was sent. [*See* Hearing Trans. p. 226 lns. 5-25]. At the time the Email was sent, there is no allegation or evidence of any proposed wage cuts to the Charging Parties' wages or the wages of others; no proposed layoffs; no proposed cuts to resources necessary for the Charging Parties to do their jobs; and no other proposed budget expenditure or cut which would in any conceivable way uniquely impact the Charging Parties or their employment. And, there is no evidence that the adoption of the 2020 annual budget some five (5) months in the future would have had any specific impact on the Charging Parties' or any other employee's employment.

To the extent that the General Counsel argues that "money," generally, and an employer's overall budget impacts employees' terms and conditions of employment, it can be said that any employer's "money" (and annual budget) has precisely the same speculative impact on nearly every facet of the business. [*See* Hearing Trans. p. 10 lns. 12-14 (GC opening statement)]. A company's money ultimately impacts the goods or services it offers the public; the office space it chooses to rent; the extent of its advertising; the software and hardware it utilizes; the insurance coverage it obtains; the law firms and accountants it uses; the décor in its brick and mortar spaces; the brand of paper it buys; etc.

The Board holds that, to be protected under the Section 7, the activity in question must have a "direct impact" on employees' wages or conditions of employment. In *Riverbay Corp., d/b/a Co-Op City*, 341 N.L.R.B. 255 (2004), the Board held that protests by a union employee against the election of a board of directors candidate who advocated for the creation of a new job of lobby attendant, where the hiring of such new lobby attendant would have had an impact on

existing union workers, was too speculative and lacked a direct nexus to terms and conditions of employment for protection under the Act. *Riverbay Corporation, d/b/a Co-Op City,* 341 NLRB 255 (2004). In finding that objections to the board candidate's election were not protected under Section 7, the Board initially observed that when analyzing whether activity is protected, "which side of the line any particular employee activity falls is a question of fact, based on the totality of circumstances." *Id*. The Board concluded that "the evidence the General Counsel adduced at the hearing does not establish that [the employer's] directors had a 'direct impact' on the employees' terms and conditions of employment," and thus was not protected. *Id*. The Board explained:

> [W]ith respect to [the board candidate's] role in the introduction of the lobby attendant position, the judge found only that the hiring of such a new category of employees arguably would have some ultimate impact on the unit employees. **This is far short of the required showing. At most, the effect was indirect and speculative, i.e., if [the board candidate] were elected, the Board would adopt the lobby attendant program, and if lobby attendants were hired, there might (or might not) be less funds available for existing employees… Here, the record simply does not establish a direct link or nexus between the implementation of the lobby attendant program and the unit employees' working conditions**.

Id. (emphasis added).

Here, the Email in question is even less tied to the Charging Parties' terms and conditions of employment than the communications at issue in *Riverbay*. There is no evidence that the eventual adoption of PUSH's annual budget months following the Charging Parties' Email would have had any impact on the wages, benefits, or other terms and conditions of the Charging Parties' employment or any other employees' employment.

3. <u>The Charging Parties Sought A Role In Making A Business Decision At the Core of Entrepreneurial Control (i.e., Adopting The Annual Budget) Which Is Not Protected Under Section 7</u>

In addition to the Email bearing no connection to the Charging Parties' terms and conditions of employment, there is yet another reason why the Email is not protected under Section 7. As the Charging Parties admitted both during the August 7, 2020 meeting the day after the Email was sent and at the hearing, their Email was not a complaint about wages or working conditions (or a complaint about anything at all) but, rather, was a request to take on a role in the core management function of adoption of the annual budget. [*See* GC Exhibit 3(b) (Transcript of August 7, 2020 meeting) p. 6, lns. 22-25, p. 7., ln. 1-23; Hearing Trans. p. 95]. The Charging Parties' sought a role in making a business decision (i.e., the adoption of the organization-wide

annual budget), which activity is unequivocally not protected under Section 7. As the Board stated in *Riverbay*:

> **[T]here is a distinction between protesting an employer's policies or business decisions and seeking a role in making those decisions. The Respondent could lawfully prohibit the latter, and it was precisely the latter that an employee was trying to do**.

Riverbay Corp., d/b/a Co-Op City, 341 N.L.R.B. 255 (2004) (emphasis added).

In the instant case, the Charging Parties did not protest any business decision or policy of PUSH (much less any decision or policy that related to their employment). They made no complaint; they aired no grievance. Instead, what the Charging Parties sought to do by way of the Email was to take a role in a job duty assigned to the board of directors and executive management team; that is, adoption of the annual organization-wide budget. The Charging Parties admitted as much during the August 7th meeting the day after their Email was sent. [*See* GC Exhibit 3(b) (Transcript of August 7, 2020 meeting) p. 6, lns. 22-25, p. 7., ln. 1-23]. Ms. Cejka declared that her Email was not a complaint of any kind, but rather, was an effort to "present" to the board of directors and "be heard and included" in the adoption of the annual budget. [*See* GC Exhibit 3(b) Transcript of August 7, 2020 meeting, p. 6, lns. 22-25, p. 7., ln. 1 (Ms. Cejka: "I mean,..[Charging Party Johnson] had asked in a meeting, our last admin meeting, to present and-- we were told no. And we weren't complaining or trying to whistleblow or anything like that; we were just asking to be heard and included")]. Ms. Johnson likewise affirmed during the August 7, 2020 meeting that they were not making any complaint in the Email, and that they "weren't saying nobody was doing anything wrong," and they "weren't saying nobody was doing anything right," but rather, they simply wanted a role in presenting the budget to the board of directors and further wanted "everybody" to "decide together." [GC Exhibit 3(b) (Transcript of August 7, 2020 meeting) p. 7 lns. 2-23]. Simply put, the Charging Parties squarely admit that they were not protesting any business decision of PUSH but, rather, sought to be decision-makers.

Making a budget presentation to the PUSH board of directors is the assigned job of the Executive Director; it is not the job of the Charging Parties or any other employee. [Hearing Trans. p. 227 lns. 3-9, p. 228 ln. 2-19]. Adoption of the annual organization-wide budget is a core entrepreneurial function vested in the PUSH board of directors and the Executive Director. *Id*. The Email, as admitted by both Charging Parties, was an attempt at taking on a role with respect to the process of adopting the annual budget that did not belong to the Charging Parties. [*See e.g.,*

Hearing Trans. p. (Ms. Cejka: "This is when Aminah Johnson asked if we could present to the board, and we were denied.")]. Such matters, which are at the "core of entrepreneurial control," are deemed by the Board to be "outside the sphere of employee interests as employees" for purposes of the Act. *See Harrah's Lake Tahoe Resort*, 307 N.L.R.B. 182 (1992). In *Harrah's*, the Board held that an employee's petition and proposal to expand an existing ESOP at his employer, which he explained in a flyer, including information about how current employees would benefit through increased job stability, pay, and pension funding, through "participatory management," was not protected under Section 7 because it did not relate to "employees' interests as employees." The Board explained:

> There is no question that George's activities were concerted. The sole issue is whether George's activities are protected within the mutual aid or protection provision of Section 7 of the Act, which turns on whether his proposal relates to "employees' interests as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978)… [W]e agree with the judge that the relationship of George's proposal to employees' interests as employees is "so attenuated that [the] activity cannot fairly be deemed to come with the 'mutual aid or protection' clause." *Eastex* at 568.
>
> The dissent correctly points out that George's proposal envisioned enhanced benefits for current employees and was not designed solely to produc[e] changes in management. The fact remains, however, that the thrust of the proposal was to cast employees in the role of owners with ultimate corporate control, and thus fundamentally to change how and by whom the corporation would be managed. The current employees would not enjoy any of the envisioned benefits unless and until they, through the ESOP, effectively controlled the corporation. It is not surprising that, other than the implication from the phrase "participatory management" that there would be new additions to management ranks, the proposal did not specify any particular management changes…. In sum, although George presented his proposal within the employee-employer relationship, the proposal was designed to change that relationship.

Id. The Board then concluded, "The test of whether an employee's activity is protected within the mutual aid or protection provision is not whether it relates to employees' interests generally but whether it relates to 'the interests of employees qua employees'…. Contrary to our dissenting colleague, we do not view the envisioned benefits for current employees as bringing the proposal within the mutual aid or protection provision of Section 7 of the Act." *Id*. (citing *G & W Electric Specialty Co*., 154 NLRB 1136, 1137 (1965)). Under *Harrah's*, the Charging Parties' attempt at

taking on managerial duties vested in the board of directors and Executive Director is not protected Section 7 activity.

In *Lutheran Social Service of Minnesota*, 250 N.L.R.B. 35 (1980), the Board found employee concerted activity was not protected when it was "not directed toward any particular objective," and the employees "formulated no agenda; they filed no grievances; and they made no demands." The Board also observed that, like in the instant case, "[t]here is no evidence that they were attempting to organize a labor organization; they made no effort to invite the other employees into some informal coalition," and noted that the Act "protects protests in which there inheres action or the possibility of action." *Id.*

Instead of making any complaint about an employment-related policy, decision, or practice, the Charging Parties' intention and effort was to be partners in the development of the final company-wide budget, which is simply not protected conduct under Section 7. *Riverbay Corp., d/b/a Co-Op City*, 341 N.L.R.B. 255 (2004) (seeking a role in making business decisions is not protected activity). Employees have no Section 7 right to be equal partners in the running of the business. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981) ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate openendedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place…").

The Email is not protected by Section 7 of the Act and the Complaint should be dismissed on those grounds.

B. THE CHARGING PARTIES' EMPLOYMENT ENDED DUE TO THEIR POOR JOB PERFORMANCE

Even if the Email was protected by the Act (which it is not), the Charging Parties' employment ended due their poor job performance; the Email was not the reason for their separations. Documentary evidence that pre-dates the Email establishes that management had ongoing discussions about the Charging Parties unacceptable job performance and termination of their employment. [Hearing Trans. p. 259-260; Hearing Trans. p. 284 lns. 6-13; Hearing Trans. p. 286 lns. 20-25; Respondent Exhibit 12 (July 21, 2020 email proposing to transfer Johnson to Ambassador role); Respondent Exhibit 18 (August 4, 2020 text messages amongst executive management discussing termination of Johnson); Respondent Exhibit 24 (text messages amongst

executive management discussing termination of Cejka); Respondent Exhibit 20 (Cejka PIP)]. The documentary evidence establishes that the Charging Parties' separation from employment was inevitable, irrespective of the Email.

With respect to Ms. Cejka, she was employed by PUSH for less than one (1) year and was issued a written Performance Improvement Plan ("PIP") after her first 90 days of employment, which PIP cites pages of performance deficiencies. [Respondent Exhibit 20]. Following receipt of the PIP, Ms. Cejka's performance problems and inappropriate workplace behavior continued, including an instance at the end of July 2020 where she confronted Executive Director Ghirmatzion and accused Ms. Ghirmatzion of lying to the community, as she voiced her disagreement with the organization's decision to end a rental assistance program. [Hearing Trans. p. 220-221]. Conversations about her inevitable termination were ongoing. [Hearing Trans. p. 286 lns. 20-25 ("There were ongoing conversations about her termination from the organization")]. Indeed, Ms. Cejka herself testified that her first supervisor, Emily Terrana told her at the end of January 2020 that Ms. Ghirmatzion wanted to terminate her employment, and that management was having discussions about her termination. [Hearing Trans. p. 93 lns. 12-19]. And, on July 9, 2020, a little less than one month prior to Ms. Cejka sending the Email, Charging Party Cejka's direct supervisor, Harper Bishop, sent a text message to another member of the executive management team, Dawn Wells-Clyburn, telling her that Ms. Cejka needed to be fired, stating: "Hey hey ho ho Kat has got to go." [Respondent Exhibit 24; Hearing Trans. p. 284-286]. Later that month, at the end of July, Ms. Cejka accused Ms. Ghirmatzion of lying to the community by ending a rental assistance program. [Hearing Trans. p. 220-221]. Days later, Ms. Cejka's access to Salesforce was cut while PUSH reviewed her continued employment. [Hearing Trans. p. 246-247].

The decision to terminate Charging Party Johnson was likewise already made before the Email was sent. The documentary evidence proves this. There are multiple written communications memorializing PUSH management's decision to terminate Ms. Johnson well before the Email. [*See* Respondent Exhibit 12 (July 21, 2020 email proposing to transfer Johnson to Ambassador role); Respondent Exhibit 18]. On August 4, 2020, Ms. Ghirmatzion, Ms. Wells-Clyburn and Mr. Bishop had a group text message conversation in which they expressly discussed the plan for Ms. Johnson's termination from employment. [*See* Respondent Exhibit 18 (Mr. Bishop

stating: "Aminah still suckered me into lunch during Covid. Can we please set a timeline for releasing her into the world?")].

In late August 2020, after Ms. Johnson's failure to perform the Tenant Advocate job reached a critical breaking point with the pandemic-mandated virtual work environment, PUSH decided to remove her from the Tenant Advocate role. [Hearing Trans. p. 190-192]. PUSH offered Ms. Johnson a severance package and new ambassador role to begin October 2020. Ms. Johnson declined the offer and, accordingly, stopped working for PUSH. [*See* Respondent Exhibit 6 (Johnson termination letter); Hearing Trans. p. 136 lns. 16-24].

Significantly, none of the other employees who signed on to the Email (i.e., Angel Rosado, Kelly Camacho, Tyrell Ford, Da'Von McCune) were terminated or disciplined following the Email. [Hearing Trans. p. 244].

The Email was not the reason for either Charging Party's separation from employment and, therefore, the Complaint should be dismissed on these grounds.

CONCLUSION

The Email, which is devoid of any reference to employee terms or conditions of employment and which was not intended to relate to the Charging Parties' terms or conditions of employment, is not protected activity. Rather than challenging any employment practice or decision of PUSH, the Email was an attempt at effectively being partners in the running of the business by having an equal say in key financial business decisions, which are at the heart of entrepreneurial control. Such an effort is not protected under Section 7 of the Act.

In any event, the Email was not the reason for either Charging Party's separation from employment. PUSH has not engaged in any unfair labor practice under the Act and the Complaint should be dismissed.

Dated: August 20, 2021

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